Katerina Linos (00:00):

Have you wondered how the EU has responded to Brexit? It turns out that COVID and the War in Ukraine have made the European Union even closer, led it to double its budget, and to consolidate all kinds of policies. With me today is EU Court of Justice Thomas von Danwitz, a judge with the European Union Court of Justice since 2006. Von Danwitz gave this year's Irving Tragen Lecture in Comparative Law on the role of the Court of Justice in the course of European integration. It is my distinct pleasure to be able to ask him probing questions about how the Court contributed to the formation of the European Union, to European peace and security ,and to the protection of rights and freedoms of EU citizens.

(00:54):

I consider the European Court of Justice the most radical supernational court. I consider some of the decisions in the last 70 years to have influenced Europe and the world. But I wanted to ask, in your 17 years, you have seen the Court respond to government crises time and time again. So after September 11th, we had the Kadi decision. After the 2008 financial crisis, we had the Wild decision. After the COVID crisis and the Ukraine crisis . . . certainly decisions and cases that are very difficult will come your way. Could you talk about one difficult and remarkable decision to get us started? What case, in your many years, stands out?

Thomas von Danwitz (01:51):

This is a very interesting question. Interesting because it depends really on how you look at cases, on how you look at our task. We have cases that are referred to us as questions of law. The case that goes along with that question of law might be on a factual basis, interesting, or it might be rather without particular significance to the legal question, posed. So we would have had a number of questions, very interesting cases where you can resume this line of jurisprudence very easily in that precise legal question.

(02:40):

For example, the Kadi case law on the sanctions that were directed at that time, quite a novelty against private entities and private individuals. And the question arose, are we going to grant effective legal protection and how far are we going to take that in particular because the European Union was entitled under international law to sanction such entities because they had been sanctioned under United Nations law? Those cases are purely legal and they are fascinating.

(03:24):

But the questions that relate to facts where you see the person behind the case and the particular situation of that person, they might even be more interesting to you as a judge and to the whole legal evolution. Today, it is worthwhile from time to time to look for example to the facts of the different case, which I know from law school teaching, when you look at a situation in which for stewardesses, the working contract foresaw that with the age of I think 40, there was mandatory ending of the contract of work because it was considered that at that time it was no more suitable to have stewardesses beyond that age limit. Of course today that seems to be out of a very different world, but we have seen many cases which are putting things on an individual level to the point.

(04:38):

For example, a case that I was reporting judge on a transgender problem, the MB case, of a person, of a male becoming a female and at the same time refusing to get divorced from her spouse. The United Kingdom at the time refused to recognize the transgender nature of that person for the sake of the old age pension scheme. But at the same time did recognize the transgender nature of the person, for example, in delivering a driver's license that was issued under the female name of the person. So those

cases stand out because they show that the Court of Justice is not adjudicating in the abstract world but has finally the decisive word to say for an individual person and her or his life. And this is something that one never should forget that we have plenty of cases where we ourselves find it very difficult to see that it needs the European court to bring justice to a particular case and to a particular person.

Katerina Linos (06:00):

I'll follow up on the gender equality jurisprudence of the Court because to me it is fascinating. To me what is fascinating is that in the US we started with a paradigm of race and we thought race means Black and white people need to be treated equally. But in the jurisprudence of the European court, there was some understanding early on that men and women are different and that equality might mean formal equality in the case of transgender rights, but it might also mean equal pay for work of equal value, a radical idea in the United States. You mentioned that you had recently reaffirmed the Barber decision in the Safeway case and to Americans, it is amazing that a court would consider different job titles that have similar substantive qualifications to require equal pay. It is radical to consider part-time and full-time workers as requiring comparability in treatment, and you have made both of those moves. I'm wondering if you could speak a little bit more about those decisions.

Thomas von Danwitz (07:22):

In part, that legal evolution is still not finished, so there will be more judgments to come forward. But the element that I should stress in order to make our jurisprudence understandable for American scholars and for American people is that the problem, in a way, lies with the division of labor between the national courts and the European Court of Justice. The national courts establish the facts. And if a national court establish in a discrimination issue or in an issue of equal pay the facts in a way that a national court states there is equality of qualification required for two different jobs, then it is not for the court of justice to question or to second guess that kind of qualification.

(08:25):

In essence, our answer is given under the premise that this characterization is upheld even by the Supreme Court of that member state and is accepted. Of course, if first instance court would go much beyond what is duty and just tell us that there is equality of qualification and we would answer on that basis, that would not mean that a superior court could not call that premise into question without circumventing our answer. So this is the way how our system works. We are just responding to the EU law question and not to the factual qualification that might be a premise for that question.

Katerina Linos (09:20):

I wanted to follow up a little bit on procedure. So I think in every national system it is fair to say that facts are established at lower levels and law at higher levels, but the procedure by which cases end up before the European Court of Justice is radically different from the procedure which is used in other supernational and national courts. Is it fair to say that most of your cases come to you through the preliminary ruling procedure in which a judge from any national court before establishing all of the facts, before that case has been appealed to higher levels, can ask a question of law straight to a supernational court?

Thomas von Danwitz (10:14):

I would not quite agree with your question or with your explanation because we indeed have a large majority of our cases emanating from national courts. And in most cases, the majority of those references come from first courts or from appeal courts and not from Supreme Courts. But that does

not necessarily imply that the facts have not been established. And even if it is a first instance court in a situation in which a court of appeal could reverse findings of facts that the first instance court would ask questions before having established the facts. We have recommendations to the attention of national courts and what we recommend is that the facts are established before asking our court. But that does not mean that the facts have to be established in definitive. So they might be subject to reversal by the higher court, but nonetheless, we like to be asked on the basis of factual premises being established by the national court before asking us so that we know what we are talking about.

(11:45):

In exceptional situations, this is of course not the case. And therefore it's correct that you refer to those cases in which we usually do not decline our competence but still answer on the basis of the premise put by the parties in our proceeding in front of us. But in those cases, our court goes very far in issuing its findings in law on the one hand and make its subject to verification on the basis of the facts to be applied to the case at hand by national courts. So those findings do have a mixed nature in a way. They are meant to be binding, but under the premise that the facts are proven to be correctly established. And it might well be that this is not the case and that all our work is done in vain in the end, but it is still our understanding of this cooperation between national courts and our court that we still enter into that exercise and give the answer to the question of law as such.

(13:15):

And you should not forget that our answers remain answers of law which are even applicable to cases in the same country but on the basis of different facts and are applicable to cases in other countries of the European Union just because it's an answer in law that is generally applicable.

Katerina Linos (13:47):

So I'll just highlight what to me as an international lawyer was stunning in that last part of your question as well as in the premise of my question. So if I understood you correctly, unlike for example the International Court of Justice which says, "This decision should have no presidential value. This applies to these two state parties," what you just said is, "Under our doctrine, this is a matter of law. We are establishing the law and it should apply very generally to other states," which is one way that ECJ is different.

Thomas von Danwitz (14:22):

Our decisions in preliminary ruling procedures do have factual [inaudible 00:14:31] on these effects. It is not a legal aga on this effect. Of course it is limited in law to the parties of the proceedings, but in fact it has presidential effect for each and every litigant in Europe.

Katerina Linos (14:51):

I will underscore something you said in your Tragen lecture earlier that today the Court of Justice of the European Union has about 500 preliminary ruling cases every year and that these are cases that are not brought by states. These are cases in which two private parties have a dispute in a national court or a private party in a state have a dispute in a national court. And there is what in American jurisprudence we might call an interlocutory appeal, a question of law is sent up to a supernational court. So you're not waiting for a state to feel that it wants to sue another state rather than resolve an issue diplomatically. Private enforcement is core to the project of what the court does and to European integration because of this procedural device that is widely used. Is that fair?

Thomas von Danwitz (15:47):

This is very fair. This is very precise what happens. And it shows in a way. . . let me put this into the historical perspective of the evolution of the European Union. It shows to what extent the European Union is supernational, meaning that private citizens are subject of union law. Union law is conveying directly rights on them. They can rely on those rights, they can found legal actions on those rights and they can tell a national court, "I am not relying on national law. For my claim, there is no national law that would suit my case, but there is European law regulation or provision that would base my claim. And I read that provision of European law in the way that it suits my claim."

(16:53):

And the opposing party says, "Well, there is no basis for that claim in national law. We agree, but we disagree that EU law founds that claim." And then it is the first place for the national court to say whether this claim is purely hypothetical or whether that could correspond to a sound interpretation of the EU law provision." And if this is so, the national court would in fact stop proceeding, ask the question of the correct interpretation of the EU law, this provision at hand, to our court. We would respond and our answer would be binding on the national court that is confronted with this litigation.

Katerina Linos (17:49):

So I will just repeat in different language what you just said because I think it is stunning. So I am a citizen of both the United States and Greece, which is a member of the European Union. As an American citizen, I could never go to an American court and say international law confers a right to me because the US ratifies very few treaties. And when it ratifies these treaties, it says, "We, the State Department, believe that individuals will have rights only to the extent that the US passes national implementing legislation." Whereas a Greek citizen, I have rights under both the treaties of the European Union and under the thousands of legislative acts that apply and I can make a complaint. If the Greek government is slow to implement any of this, my rights as an individual are not impacted. I have rights directly under these supernational instruments.

Thomas von Danwitz (18:51):

What you said at the very end is I think the clue to that striking difference. In the case of the United States, you are confronted with a situation that you cannot invoke international law. In the case of the European Union, the treaties are concluded in the form of international law, but they create a law that is, in nature, different from international law that is supernational law. And in the longstanding line of case law since the famous judgment in Van Gend en Loos from 1963, the court recognized that those provisions of the treaty and of statutory EU law confer directly rights on citizens. The member states cannot bar those rights by actions taken unilaterally after they have subscribed to the treaty provisions in question or to the legislative acts. So it's in a way a second branch of national law that is created in the European communities in favor of economic operators, citizens, and even nationals of third countries, take for example international protection.

Katerina Linos (20:29):

Let me ask a little bit about your background. I grew up in the European periphery where the dream of a stronger European Union with greater influence and now with greater funds has become a reality over my lifetime. But your legal career started in Germany and not only did you win every German distinction, but you also went through the French tradition and through all of their hoops. When you began your legal career, were you envisioning a European supernational system? Were you envisioning

that you would be at its pinnacle? What was the hope at the time and how did you proceed? What were some moments?

Thomas von Danwitz (21:15):

Well, this is in a way a question that I find difficult to answer. You should know that I am a boy from the countryside. Together with my brother, we were the first generation in our family that had done academic studies. So in law school, I was not concerned with dreams of making a distinguished career, but I was simply hoping to pass the exam in order to be able to live properly on my qualification. When I had done the practical legal training that comes after the law school exam, I had three options. Option first was to join a big law firm, which at the time did European competition law, which I found terribly interesting. And the second option was to join the Federal Ministry of Justice, which was a great honor and which I was really looking for because I was always interested in constitutional law questions.

(22:25):

And the third option was in a way put before me by sheer accident because my academic mentor called me up and said, "We have lost contact. I heard that you were about to join the Ministry of Justice. Why don't we have a chat because I think the academic career could be something that would appeal to you?" And in the end, I chose to join him. He was one of those professors who were counseling the constitutional court for about 15 years in each and every big case. There was rarely a professor in those times who was more often solicited to go to proceedings and represent a government or a state or a private individual for constitutional claims. And I learned a lot from that.

(23:29):

And then I continued my way to France and I had been to the Court of Justice as an intern. And of course those two experiences were merged in my further way to academia. And that is why I could perfectly play on both pianos, so to speak, the European law piano and the constitutional law piano, but in particular, litigation of that kind of constitutional nature that we have both in constitutional courts and in the European Court of Justice.

(24:09):

When I became then a law school professor in 1996 with a chair in the Ruhr University, I was one of the few specialists in European law, in particular, environmental law, administrative law questions, regulatory questions. At the time there was not so many regulatory areas, but that was how I was confronted with questions of bringing European law and national law together. And it became apparent that in many respects, national law was not precisely compatible with European directives or European regulations. And so I was one of those academics who looked at this from a rather specific point of view looking into the details. And that's why I had a lot of contacts with government officials on questions of the correct transposition, for example, of directives by the federal legislature or the state legislature. And that's how I came known in this club and finally was chosen relatively young at the age of 44 to join the Court of Justice.

Katerina Linos (25:33):

I did not know that you started from the countryside and did not have a storied tradition of legal academics on both sides of your family. That makes your journey even more distinctive. Let me ask about a body of European law that you mentioned, European competition law. Because here in California, that's the body of law that seems to regulate our biggest companies. So when we think about hundreds of millions in financial penalties or the business model that Google, Apple, Facebook, and the other tech giants have, your jurisprudence shapes it. Could you talk about some of those big decisions

on the right to be forgotten on taxation obligations, on direct targeted advertising, on a model of fee sharing? I know some of these are still pending, so I don't want to ask too much on those, but to the extent, you can talk about how you think of regulating the technology industry globally, I'd be curious to hear more.

Thomas von Danwitz (26:43):

Indeed this is a very important and interesting field. But to start out for the sake of avoiding any misunderstanding, I stress that European legislation is of course not specifically regulating a certain economic operator or tech companies or more specifically Californian tech companies. But what Europe has enacted and had enacted, which is not to be forgotten before the huge wave of digitalization had all its force by a directive enacted in 1995 on the protection of personal data. We had, to put it mildly, very limited jurisprudence on that directive before 2008. So about 13 years, this was a rather dead field for us, the European Court of Justice. The reasons for this are certainly interesting for academics. I know there is a big book to come on that history and how we have to understand that history, but this is of course not for me to elaborate on it.

(28:17):

But from 2008 and in particular after the entry into force of the Charter of Fundamental Rights conveying for the first time a substantive, and by the way procedural rights to protection of personal data, the jurisprudence of the court has evolved rather rapidly. This has created a framework which was of course not to be foreseen easily. So that litigation has of course led us to interpret, for example, what is consent if you have to consent to the use of your personal data. Again, we had a landmark decision on the question. The landmark case was a finished case in which the court decided as a matter of principle that the right to private life and to protection of personal data was important enough so that exceptions had to be subjected to the rule of strict necessity.

(29:32):

For the rest, I think I can characterize that all that line of jurisprudence by one rather simple statement. For us, the task basically consists in giving effect to what was enacted in that directive from 1995 and which was on the brink to be forgotten, and in particular, which was not enforced by supervisory authorities and which is difficult to be enforced by private individuals, because in essence you have no big material damage that you might suffer or you might find it very difficult to establish that damage and so on and so forth. And for the court of justice, those questions came and made us interpret those provisions in the way that they effectively convey rights upon individual persons. Of course, taken in a sum, that jurisprudence is a kind of regulation, but here again you need to bear in mind that the court did not have a concept of its own of how to regulate tech or how to protect personal data. But we tried even in our first decision on the right to be forgotten, to trace our jurisprudence back to the substantive rules of that old directive from 1995.

(31:22):

And quite frankly speaking, now there is a lot of talk about the GDPR. In some way, the GDPR has changed the world because the rules of the game have changed in a certain respect, for example, when you look at the fines, when you look at private enforcement. But the substantive provisions of the GDPR do not in each and every respect differ significantly from that old directive. In essence, the new world consists of saying, "Hey, we are serious about what we said 20 years ago." And now I won't neglect the serious nature of that change because if a fine can go up to 4% of the total worldwide annual turnover of a company, that might be a very important tool to regulate behavior of that company. But again, our

first big case on defining power of the national authorities is a case that is not concerning a tech company, but that is concerning a company renting out apartments for violation of personal data.

Katerina Linos (32:53):

I'm in complete agreement with you that the GDPR has changed the world even though the text is not so radically different than earlier legislative texts. When I look at the text of the Digital Services Act and the Digital Markets act, there I see text that really could change the world. I see provisions in their calling for immediate takedown of offensive conduct. I see provisions there that call for separations of different business models, for Apple for example. I see an effort by European legislators to very comprehensively regulate the tech industry in a way that the GDPR was focused on privacy alone. When do you expect to deal with your first cases under these comprehensive efforts?

Thomas von Danwitz (33:47):

Litigation can come to us immediately after the entry into force of those new legal acts. The question simply is, what are the strategies of those who are concerned? Will they seek litigation? Will they seek immediate clarification? Or will the strategy rather be to find a way and a time to apply those rules in practice, a kind of negotiated code of conduct of applying those rules?

(34:28):

But this all is not for us to speculate about. We are a court. We are passive. We have to wait until cases will come. That having said, I'm rather convinced that it won't be the commission or the member states that would bring those actions or those cases, but that it will be once again that preliminary ruling procedure that we were talking about, bringing those cases from a national court to us maybe as we have had cases recently, for example, from a national competition authority that might find that some behavior is anti-competitive and that such a decision is attacked by the company in question and then brought in front of a national court which might seek assistance when it comes to the interpretation of the substantive rules with the Court of Justice.

Katerina Linos (35:40):

Thank you so much. I have learned a lot about the Court, about your life, your career, and it's been mostly a very optimistic vision. I wanted to ask some final questions about concerns, about worries for the future. And in particular, I wanted to ask about Brexit, about Hungary, about Poland, about how the court is responding to threats to the European integration project. Which of these threats worries you and which are you in a position to do anything about?

Thomas von Danwitz (36:18):

Let me just say that I might sound optimistic. And indeed, I have become in a way optimistic because I'm still there after 17 years. And having said that, I mean the European Union is still there. The Court is still, after 70 years, performing its mission largely along the same lines as they were expressed in the very beginning of the Court. And not only in this last 17 years, I can tell you that it was a shaky ride that we had and that we were all thinking, “This cannot work out, and this will be a very difficult year, and we won't see another year of that,” and it always – when one crisis ended, another one started. But still we are there. The European Union has proven to me to be much more solid than a lot of people have said in public, hoped for in public, or worked for.

(37:41):

But having said this, of course we have to contribute and we have to be very careful about our mission and implementing our mission in those difficult times. We have to be precise and severe on the rule of law because it's fundamental on the one hand. But on the other hand, we may not overburden member states with obligations that they might not be able to fulfill. On the other hand, we are a court and we have to win the hearts and the minds of European citizens. We cannot be a court that always rules in favor of what the government pleases. So this is a very delicate balance that we have to operate. And in each and every case, the outcome might be slightly different and you might discuss a lot about it. We do that in our deliberations.

(38:51):

So now the crisis on the rule of law is something that worries me or that worried me a lot. I think we have found a way that might find acceptance. I would not be pessimistic about the mere rule of law issue. I am of course shocked by the situation after Russia started his war on Ukraine. And I am of course very worried that this situation might continue forever and forever and bring about very difficult situations. We will be confronted in the courtroom with the sanctions that the EU has issued and we will have to give effective legal protection even in that difficult situation. But the court will live up to its standards and will decide accordingly. This is not easy to do.

(39:57):

For the rest, what worries me personally speaking and what has not so much come to the docket of my desk at the court is the climate change because the legal texts so far do not reflect or have just started to reflect that new orientation. But I'm sure one of the biggest challenges for constitutional courts on the national level or Supreme Courts on the national level and the European Court of Justice together with other courts around the globe will be to ensure that the law finds a right balance between the wisdom and the liberty of each and every generation to decide on its fate and the justice that has to be done to the generations to come. Which I think is not only in law and in philosophy, a very difficult question to answer, but even in practice it is extremely difficult if you just take into account on what precise issues we become more and more aware, but about to be too late to act.

(41:27):

So that requires action in times of uncertainties. And for judges to judge whether an action taken in times of uncertainties are legally correct or incorrect is again a bigger difficulty than it is for a government to do. So there again, we have to be courageous in our mission, but we have to be careful in judging the effects of what we do. This will be a great challenge, and I'm sure no single judge on our court nor the court by itself has an answer so far, but I'm sure that this will be the big challenge for the years to come.

Katerina Linos (42:17):

I'm so glad that you made that opening, that you mentioned that your early career was in environmental law. I've seen judges on the ICJ try to make small openings and say the precautionary principle perhaps is international custom, but it seems that to the extent that there are individual national courts that have made radical moves and environmental advocates are seeking courts that might be willing to hear more cases, it's definitely reason for optimism that this urgent issue might find some hospitable judicial forum. My last question is always just an open-ended one. What did I not ask you about? If you wanted to leave a message for an American audience, for a next generation, for a younger audience, what is one fascinating or interesting story that you would like to talk about?

Thomas von Danwitz (43:08):

As a message to leave to the audience, courts do act in an environment that is of course taking into account social evolutions, economic evolutions, political evolutions. But courts do have a very direct affiliation to the law. And law always means consistency and always means responsibility. But with all that, you need to build confidence in the law. And there what we find is that it is in a world that continuously changes where we have one threat after the other every year. And we are talking about big threats and big challenges that we have to give judgements on the basis of our precedents, on the basis of statutory law that explained to our public and to our citizen that we are not inventing things. We are not giving policy directions, but we are just drawing the line of the law with each and every case a bit further. And that we give an answer to a completely new question on the basis of what has been acquired a generation ago.

(44:49):

And in essence, we invite people to reason in their personal life the same way to take what they carry with them and to take that as the capital that they have to meet the challenge that they are confronted with. And for the judiciary, I can say after all, it's the individual that counts. Everybody has a responsibility for the whole. Whether it's a litigant, whether it's a judge, whether it's a government, you have to know how you bring the world a bit further to meet those challenges. And this is what we should never forget.

Katerina Linos (45:45):

Thank you so much. That was wonderful to have the idea of bringing the world a little further. That is an interpretive ideology that is very progressive and very hopeful at this moment. Thank you so much.

Thomas von Danwitz (45:58):

My pleasure.

Katerina Linos (46:02):

I hope you enjoyed this episode. If you want to hear more, check out the show notes where you'll find a link to the published article, The Role of the Court of Justice in the Course of European Integration. You might also want to know more about the Irving Tragen lecture. It is named in honor of Irving Tragen who served for 55 years in key diplomatic service positions, including very senior posts across Latin America and the Caribbean. There's a special Borderlines episode devoted to his life, and I hope you enjoy that one too.